

Summary of findings

Introduction

The partial defences of provocation, substantial impairment (formerly diminished responsibility) and excessive self-defence reduce a crime that would otherwise be murder to manslaughter. In New South Wales until 1955 and in England until 1957, a conviction for murder carried a mandatory sentence of death. It was in this rigid punitive environment that the common law developed the partial defence of provocation. In 1974 the New South Wales Parliament introduced a partial defence of diminished responsibility to accommodate offenders suffering a mental abnormality, who would otherwise be convicted of murder. Partial defences reflect a rationale that, in some cases, the extenuating circumstances in which a person commits murder may warrant a conviction for the less serious offence of manslaughter.¹ A conviction for murder is the most severe offence in the criminal calendar, attracting the longest sentences and the greatest community outrage.

Partial defences are understandably a contentious topic. In a criminal trial, these difficult issues are decided by the jury as fact finder or, in rare cases, by a judge alone. In some cases, the Director of Public Prosecutions (NSW) may decide to accept a plea of guilty to manslaughter on the basis of a partial defence in full satisfaction of an indictment for murder. But in equivocal or borderline cases it is *the jury* as fact finder at trial who decides whether a partial defence should reduce a crime of murder to manslaughter. In a trial for murder, the judge must leave a partial defence to the jury whenever there is a “viable case”, regardless of the tactical decisions made by the defence. The House of Lords explained the Australian position in *R v Coutts*:

“In Australia, as here, the trial judge’s duty to direct the jury on alternative verdicts which there is evidence to support is not removed by the decisions of trial counsel.”²

1 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [3].

2 [2006] UKHL 39 at [21].

Many legal commentators argue that partial defences are biased against some classes of offenders or victims, or that they represent an historical anachronism.³ However, commentary is often anecdotal and does not refer to empirical evidence. This study provides a comprehensive empirical picture of partial defences in New South Wales for the period 1990–2004. It collects information on all cases raising a partial defence in the 14 year period, including:

- The number of offenders who had a partial defence accepted or rejected.
- Features of offenders who were convicted and sentenced for manslaughter on the basis of a partial defence.
- Sentencing results for offenders sentenced for manslaughter based on a partial defence.

Background

New South Wales is the only Australian State or Territory in which all three partial defences operate. *Table 1* details which partial defences are available in each jurisdiction.

Table 1: Partial defences to murder in Australian jurisdictions

	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
Substantial impairment/diminished responsibility	✓	X	✓	X	X	X	✓	✓
Provocation	✓	X	✓	✓	✓	X	✓	✓
Excessive self-defence	✓	✓	X	✓	X	X	X	X

3 For an overview of the criticisms, see New South Wales Law Reform Commission, *Report 83: Partial Defences to Murder—Provocation and Infanticide* (1997), Sydney, at [2.7], [2.15] and Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), Melbourne, at 26–35.

Provocation first emerged in the context of affronts to a man's honour in 17th Century England. As Gleeson CJ put it in *R v Chhay*⁴:

“... the law on this subject emerged from a multiplicity of rulings in single instances, which in turn were given over a period during which the law of culpable homicide underwent considerable change and development. The modern law recognises provocation as a circumstance in which an accused person is ‘less to blame morally than for what he does deliberately and in cold blood’: *Parker* at 651. This has been explained as a concession to human frailty.”

Diminished responsibility operates where an offender suffers a mental health condition not sufficiently severe enough to raise a defence of mental illness, but nevertheless substantially impairs the offender at the time of the killing. The offender is evaluated using medical and non-medical criteria first established in 1957.⁵ When New South Wales reformed diminished responsibility in 1997 to emphasise “community values”, the Attorney General explained the rationale for the continuing existence of the partial defence in the following terms:

“The reason for a defence of this kind is that the legal system should punish people only for the acts for which they are responsible.”⁶

Excessive self-defence has an ephemeral history as a partial defence. After a number of lower court rulings, the High Court confirmed it as a partial defence in *Viro*⁷ in 1978, but later abolished it in *Zecevic*⁸ in 1987. It was resurrected by Parliament in New South Wales in 2002,⁹ and in South Australia. It has not been accepted as a defence in England and New Zealand.

Reform

In recent years, many common law jurisdictions embarked on review and reform of their partial defences.¹⁰ In 2003, Tasmania abolished provocation, followed by Victoria in 2005. The law of provocation in England remains unclear. In 2004, the Law Commission for England and Wales completed a report into partial defences to murder and commenced a wide-ranging review of the law of homicide. In *Holley*, in 2005, the Privy Council extraordinarily sat nine of the 12 Lords of Appeal in Ordinary

4 (1994) 72 A Crim R 1 at 7.

5 *Homicide Act* 1957 (UK) s 2; enacted in substantially the same terms in New South Wales by the insertion of s 23A *Crimes Act* 1900 in 1974.

6 The Honourable JW Shaw MLC, Attorney General, Second Reading Speech, Crimes Amendment (Diminished Responsibility) Bill, *New South Wales Parliamentary Debates (Hansard)*, Legislative Council, 25 June 1997, 11064–11065.

7 *Viro v The Queen* (1978) 141 CLR 88.

8 *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 664.

9 *Crimes Amendment (Self-Defence) Act* 2002 .

10 See Appendix B: Australian and international reports on partial defences.

and held that the House of Lords had wrongly decided *R v Smith*.¹¹ The House of Lords in *Smith* had held that, in any given case, the personal characteristics of the accused can be taken into account in determining whether a “reasonable man” could have lost self-control.¹² The Privy Council’s view was that the “reasonable man” is limited to a person of the same gender and age as the accused, but no other personal attributes may be added. The Privy Council held that:

“the widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts ... Their Lordships share this view. But the law on provocation cannot be reformulated in isolation from a review of the law of homicide as a whole.”¹³

When the lower English appeal court was faced with these conflicting decisions it decided to apply *Holley* rather than *Smith*.¹⁴

In New South Wales, the Law Reform Commission published two reports¹⁵ on partial defences in 1997, recommending reform of diminished responsibility and provocation. Parliament amended provocation in 1982, reformulated diminished responsibility as substantial impairment in 1997 and introduced excessive self-defence in 2002.

Questions posed

This study seeks to answer empirically some of the recurring questions posed by the ongoing scrutiny and reform of partial defences:

- How frequently are partial defences relied upon for persons charged with murder?
- When partial defences are relied upon, what are the success rates for each?
- Do juries accept partial defences?
- What proportion of cases involve the Crown accepting a plea of guilty on the basis of a partial defence in full satisfaction of an indictment for murder?
- What are the predominant factual scenarios in which partial defences are accepted by a fact finder at trial or via a plea of guilty?
- What factors are taken into account when a judge sentences for manslaughter on the basis of a partial defence?
- What are the range of sentences imposed?
- How are disadvantaged or vulnerable groups affected by partial defences?

11 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23; *R v Smith* [2001] 1 AC 146; [2000] 4 All ER 289.

12 Section 3 of the *Homicide Act 1957* (UK) states that “the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury.”

13 *Attorney General for Jersey v Holley (Jersey)* [2005] UKPC 23 at [27].

14 *R v James; R v Karimi* [2006] 1 All ER 759.

15 New South Wales Law Reform Commission, *Report 82: Partial Defences to Murder—Diminished Responsibility*, 1997, Sydney; and *Report 83: Partial Defences to Murder—Provocation and Infanticide*, 1997, Sydney. See www.lawlink.nsw.gov.au/lrc.nsf/pages/R82TOC <accessed 14 June 2006>.

The Data

Study period

This study covers the period 1 January 1990 to 21 September 2004.

In this period, according to the Commission's Judicial Information Research System (JIRS), there were 460 manslaughter convictions overall and 437 murder convictions, or a total of 897 offenders convicted of murder or manslaughter.

Sources

The data in this study was obtained from JIRS. Detailed information about partial defence cases was extracted principally from the remarks on sentence of the judge and the appeal judgment (where applicable). Citations for all identified cases in the study period involving partial defences are listed in Appendix A.

Procedural routes

When an accused pleads not guilty to murder but raises a partial defence, their case is dealt with in one of two ways:

1. The Director of Public Prosecutions (NSW) may decide, based on DPP Guidelines,¹⁶ to accept a lesser plea of guilty to manslaughter in full satisfaction of the indictment for murder.
2. If the Director of Public Prosecutions (NSW) rejects an accused's offer to plead guilty to manslaughter on the basis of a partial defence, or the accused pleads not guilty, they stand trial for murder. The accused may then raise a partial defence before a jury (or, in some circumstances, in a judge-alone trial).

In a murder trial, the burden is always on the prosecution to prove the elements of the offence beyond reasonable doubt. Prior to 1998, s 23A(2) *Crimes Act* 1900 provided that it was for the accused to prove more probably than not that they suffered from diminished responsibility. Section 23A(4) requires the same for substantial impairment. In *Melbourne v The Queen*, McHugh J suggested that a plea of diminished responsibility:

“like a plea of insanity, is a plea of confession and avoidance. Any person, relying on the plea, must prove it ... Until an accused person tenders evidence in support of the claim of diminished responsibility, the Crown has no issue to meet.”¹⁷

16 Available from the website of the Office of the Director of Public Prosecutions: www.odpp.nsw.gov.au/guidelines/guidelines.html <accessed 20 June 2006>.

17 (1999) 198 CLR 1 at [9].

On the other hand, provocation under s 23(4) requires that the onus is on the prosecution to prove beyond reasonable doubt that the killing of the victim was not done under provocation. Where excessive self-defence is raised, the Crown must prove beyond reasonable doubt that the accused did not believe they were acting in self-defence. As discussed above, the High Court decision of *Pemble* obliges the trial judge to leave a partial defence to the jury whenever there is a viable case.¹⁸

For convenience, this study describes cases where the offender was convicted and sentenced for manslaughter on the basis of a partial defence in terms of the defence being “successfully raised” or “accepted”. These terms are used as shorthand, despite the different proof requirements for each defence.

Raising a partial defence

Between 1 January 1990 and 21 September 2004, 232 of 897 homicide offenders (26%) raised a partial defence:

- 88 offenders (38%) had a plea of guilty to manslaughter based on a partial defence accepted by the Crown.
- 142 offenders (61%) raised a partial defence at trial.
- Two offenders (1%) had a verdict of manslaughter based on diminished responsibility substituted on appeal, after being convicted of murder at trial.

In the study period, 126 offenders raised either diminished responsibility or substantial impairment:

- 57 offenders (45%) had a plea of guilty to manslaughter accepted by the Crown.
- 67 offenders (53%) raised a partial defence at trial.
- Two offenders (2%) had a verdict of guilty to manslaughter substituted on appeal.

There were 115 offenders who raised provocation:

- 32 offenders (28%) had a plea of guilty to manslaughter accepted by the Crown.
- 83 offenders (72%) raised an issue of provocation at trial which the Crown had to negative.

18 *Pemble v The Queen* (1971) 124 CLR 107 at 117–118 per Barwick CJ: “Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.”

These figures include 16 offenders who claimed both provocation and either diminished responsibility or substantial impairment.

Only seven offenders raised excessive self-defence, all successfully:

- Four offenders had a plea of guilty to manslaughter accepted by the Crown.
- Three offenders raised excessive self-defence at trial.

Partial defence convictions

There were 156 offenders who successfully raised a partial defence, either through the Crown accepting a plea of guilty to manslaughter, or through the offender succeeding at trial:¹⁹

- 74 offenders were sentenced on the basis of diminished responsibility or substantial impairment.
- 65 offenders were sentenced based on provocation.
- Ten offenders were sentenced on both provocation and either diminished responsibility or substantial impairment.
- Seven offenders were sentenced based on excessive self-defence.

Success rates

Successful partial defences (156) account for 17% of the total number of homicide convictions (897) and 34% of manslaughter convictions (460).

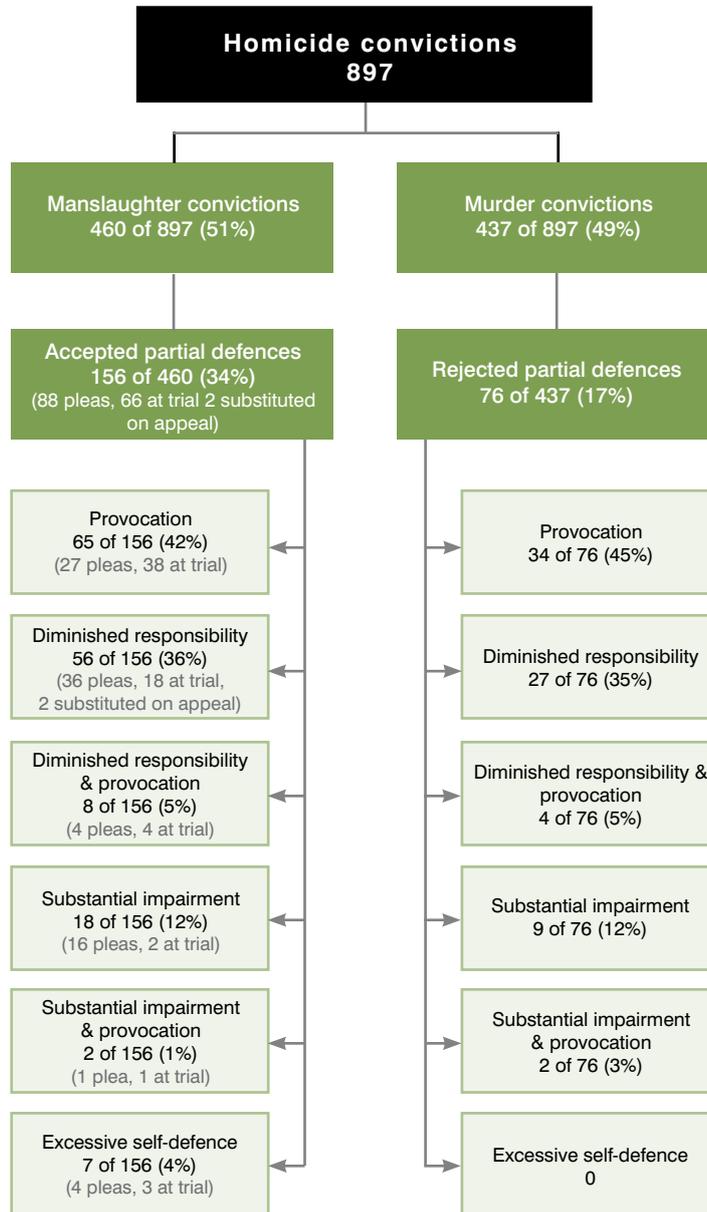
The 156 offenders who were sentenced on the basis of a partial defence (out of the 232 who raised the issue) represent an overall success rate of 67%. There was little difference in success rates by type of defence: diminished responsibility (67%), substantial impairment (65%) and provocation (65%). The 100% success rate for excessive self-defence cases is likely affected by the relatively short period in which the defence has been operating and the resulting small sample size.

Out of the 142 offenders who raised a partial defence at trial (either before a jury or judge alone), 66 were convicted and sentenced for manslaughter on the basis of that partial defence (46%).

Figure 1 illustrates the full breakdown of offenders who raised a partial defence in the study period.

¹⁹ As stated above, there were also two offenders who had a manslaughter verdict substituted on appeal.

Figure 1 Offenders convicted of homicide, 1 January 1990 – 21 September 2004²⁰



20 The figures for rejected partial defences exclude two murder cases where it was not possible to ascertain whether the offenders (who pleaded not guilty to murder but were ultimately convicted by a jury of that charge) relied upon a partial defence. Note also that excessive self-defence was only available as a defence from 22 February 2002.

Gender characteristics

Out of the 156 offenders who successfully claimed a partial defence, 119 were male (76%) and 37 were female (24%). This figure is slightly higher than the general proportion of female manslaughter offenders found in the Judicial Commission's 1994–2001 homicide study.²¹ In that study, 20% of all manslaughter offenders were female.²² Victims were also predominantly male in cases where a partial defence was successfully claimed. Among 165 victims, 118 were male (72%) and 47 were female (28%).

Sentences for offenders who successfully raise a partial defence

Offenders sentenced on the basis of partial defences received a broad range of sentences. This reflects the wide variety of circumstances in which the crime of manslaughter is committed.

In the most extreme cases, sentences other than full-time custody were imposed on 14 out of 156 offenders (9%).²³ These sentences were more common in diminished responsibility/substantial impairment cases than in provocation cases, and were most prevalent among the small sample of cases in which both diminished responsibility/substantial impairment and provocation were established (three out of ten instances).

Findings

Diminished responsibility and substantial impairment

- The reform of s 23A in 1997 appears to have achieved its stated aim. The introduction of the notion of community standards has resulted in a stricter test. We found that, since the reforms, fewer offenders are raising the defence and fewer offenders are succeeding than under the previous diminished responsibility regime.²⁴ This has occurred in circumstances where the overall homicide offending rate has remained stable throughout the period under review.²⁵
- Offenders who successfully claimed the partial defence under both diminished responsibility and substantial impairment generally displayed severe mental health conditions.²⁶

21 J Keane & P Poletti, *Sentenced Homicides in New South Wales 1994-2001*, 2004, Judicial Commission of NSW, Sydney.

22 Including two infanticide outcomes.

23 There were 11 s 558 or s 9 bonds, two sentences of periodic detention and one s 12 suspended sentence. These figures exclude *R v Low* (1991) 57 A Crim R 8 in which the Crown successfully appealed against a s 558 bond.

24 See below at 16–17.

25 Australian Institute of Criminology, *Australian crime: facts and figures 2005*, 2006, Canberra.

26 See below at 20–21.

- Although the numbers are relatively small, success rates in jury trials are lower for the defence of substantial impairment than for diminished responsibility.²⁷
- There have been no severity of sentence appeals and one Crown appeal against sentence since the introduction of substantial impairment.²⁸

Provocation

- The defence is most commonly raised in the context of violent confrontations between men, often involving alcohol.²⁹
- Since at least 1990, there have been no New South Wales cases similar to the Victorian case of *Ramage*, which led to the abolition of provocation in that State.³⁰
- There have been no offenders convicted of manslaughter based on provocation following a non-violent homosexual advance since *Green* in 1998.³¹
- Sentences reflect the wide variations in the objective and subjective features of each case.³²

Excessive self-defence

- There are only a small number of cases because the provisions reintroducing the defence commenced in 2002.³³
- Similar to provocation, a number of cases involved violent confrontations between men in circumstances of intoxication.³⁴
- Relatively small case numbers warrant caution in identifying broad sentencing trends.³⁵

27 See below at 16–17.

28 See below at 67.

29 See below at 39–40.

30 See below at 42. In *R v Ramage* [2004] VSC 508, the offender killed his estranged wife after she ended their relationship and said she had found a new partner. The offender successfully claimed provocation. *Ramage* led to a reference to the Victorian Law Reform Commission and, following that Commission's report *Defences to Homicide: Final Report* (2004), op cit n 3, the abolition of provocation in Victoria.

31 See below at 43–45. *Green v The Queen* (1997) 191 CLR 334. Following a successful High Court appeal against his conviction for murder, Green was convicted at a new trial in 1998 of manslaughter based on provocation. See *R v Green* [1999] NSWCCA 97. Since 1998, however, there have been two cases where more ambiguous evidence of an aggressive or violent homosexual advance has been accepted as provocation: *R v Marlow* [2003] NSWSC 1130; *R v Ladd* [2001] NSWSC 1055.

32 See below at 69–70.

33 See below at 51.

34 See below at 53.

35 See below at 74.